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Margaret Mcallister v. Lamar Bybee, Carvel Mattsson, Administrator of the Estate of O'Dell Watson, Deceased California-Pacific Utilities Company, a Corporation, and Kanab Cfty, Utah : Brief of Defendants-Respondents Lamar Bybee, Carvel Mattsson, Administrator of the Estate of O'Dell Watson, Deceased

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Hanson & Baldwin and Robert W. Brandt; Attorneys for Defendants and Respondents

IN THE SUPREME COURT
of the
STATE OF UTAH

MARGARET McALLISTER,
Plaintiff and Appellant,

vs.

LAMAR BYBEE, CARVEL MATTSSON, Administrator of the Estate of O'Dell Watson, Deceased, CALIFORNIA-PACIFIC UTILITIES COMPANY, a corporation, and KANAB CITY, UTAH, a municipal corporation,
Defendants and Respondents.

Case No.
10726

BRIEF OF DEFENDANTS-RESPONDENTS LAMAR BYBEE, CARVEL MATTSSON, Administrator of the Estate of O'Dell Watson, Deceased

Appeal from the Judgment of the
District Court of Kane County, Utah
Honorable Ferdinand Erickson, Judge

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INDEX

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STATEMENT OF KIND OF CASE

Appellant's action was brought to recover damages for injuries allegedly sustained when she fell after getting out of a parked automobile intending to walk diagonally from the curb across a parking area to a public sidewalk in Kanab, Utah.

DISPOSITION IN THE LOWER COURT

At the conclusion of appellant's evidence the trial court granted respondents' motion to dismiss appellant's action.

NATURE OF RELIEF SOUGHT ON APPEAL

The respondents Bybee and Mattsson seek to have the judgment of the trial court affirmed.

STATEMENT OF FACTS

The appellant's statement of facts is general in nature, lacking in transcript page and record reference. The statement does not include some facts which have a direct bearing on the issues involved in this appeal.

The accident for which appellant sought damages occurred September 16, 1963 in Kanab, Utah, when she fell some where between the curb and sidewalk on the north side of Center Street after leaving the right front seat of an automobile that had parked parallel to the curb headed west. (Tr. 31, 32 Ex. A) The accident occurred on property belonging to the City of Kanab and in an area generally in front of a building and property owned by the respondents, Bybee and Mattsson. (Tr. 138) At the time, the building was under lease to and occupied by the respondent, California-Pacific Utilities Company. (Tr. 141) Center Street runs east and west and is bordered on the north by an eight inch

high back curb and gutter, next to which is located a fairly wide generally unimproved parking strip area. (Ex. 1)

A public sidewalk belonging to Kanab City runs along on the north side of the parking area. (Ex. 1)

The First Security Bank of Salina building adjoins respondents' property on the east. Appellant was intending to walk in a northeasterly direction to the bank on the morning of the accident. (Tr. 30)

Located on the parking strip area in front of respondents' building, about 15 feet apart and approximately two feet back from the curb, were two cement blocks, 18 inches square. These blocks were painted red and were raised six to eight inches above the parking strip ground level. (Ex. 1)

These blocks at one time had served as a base for support posts for a canopy that extended out to the street from the front of respondents' building when it had been operated as a service station. (Tr. 139) Appellant, a long time resident of Kanab worked near the area where the accident occurred for many years. She had been to the bank regularly and had seen the blocks on numerous occasions. (Tr. 43 and Tr. 50)

The weather was clear and bright (tr. 43). She had good vision (Tr. 50). Nothing distracted her and there was no reason why she could not have concentrated on the business of walking from her car to the bank. (Tr. 50, 51, 52)

At appellant's deposition taken some 14 months after the accident she testified, "Well, I stepped on it and I don't know whether it was right on the curb where I stepped out to step up on the curb but I stepped out and then stepped up and brought my other foot forward and then I went over and that's all I know and all I can tell you." (Dep. p. 17, Tr. 46)

At the trial in attempting to describe what occurred, appellant testified she got out of the car, closed the door, started to walk and then, "and I fell over something but I don't know what it was." (Tr. 32). She was unable to state whether she had taken more than one step or if so, how many. She did not know what object she encountered, that caused her to fall. It could have been the cement block, it could have been a pipe, it could have been a rock or some other object in the area, including grass or weeds. (Tr. 56, Ex. 1)

It is readily apparent from a reading of appellant's testimony that she has no knowledge of what caused her to fall. (Tr. 55, 56, 57 and 58)

The trial court at the conclusion of appellant's case granted a motion for dismissal as to each of the respondents upon the grounds that appellant from her evidence had failed to establish a cause of action as against the respondents.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT OF DISMISSAL WHERE APPELLANT'S EVIDENCE AS TO THE PROXIMATE CAUSE OF INJURY WAS BASED ON SPECULATION AND CONJECTURE.

In appellant's brief under Points I and II, it is contended that respondents, Bybee and Mattsson owed a duty to the appellant and that they failed to perform that duty. While these two principals are necessary elements of appellant's case, it is readily apparent that neither element need come under consideration if appellant failed to produce evidence to support a finding that the conduct complained of was the proximate cause of her injury. The proximate cause of an injury is never presumed and the burden rests on the appellant to prove this proposition. *Jackson vs. Colston*, 16 Utah 295, 209 P. 2d 566 Utah (Utah 1949).

It is an elementary and long standing principal of law that where a plaintiff seeks damages for injuries sustained as a result of negligent conduct of a deendant the burden is upon plaintiff to produce evidence to substantiate his claim and where it appears from the plaintiff's evidence that the accident complained of may have been occasioned by one of two or several equally probable causes; only one of which the defendant could have been responsible for, the plaintiff's case fails as a matter of law.

Tremelling vs. Southern Pacific Co., 51 Utah 189, 170 Pac. 80 (Utah 1917)

The court may not permit a jury to consider a question of proximate cause which is based on matters of speculation and conjecture. *Dern Investment Co. vs. Carbon County Land Co.*, 94 Utah 76, 75 P. 2d 660 (Utah 1938).

The appellant first initiated a claim in this case by filing a formal damage claim dated October 3, 1963 with Kanab City. In her claim, a copy of which is attached to the appellant's complaint on file herein, she alleges on information and belief that she tripped over a raised cement block with several pipes projecting therefrom which was located almost against the curb and refers to pipes projecting to the east of the cement block. (Ex. A, plaintiff's complaint and record).

From appellant's complaint filed September 11, 1964, under paragraphs 5, 6, 7 and 8, she appears to have abandoned her claim that she tripped over a raised cement block and alleges that she tripped over a pipe projecting above the sidewalk. (Plaintiff's Complaint, Record).

From a review of the transcript of testimony and examination of the photograph exhibits it become readily apparent that at the time of the accident there were no pipes protruding from either of the two cement blocks located on the parkway. (Plt's Ex. 1, Def. Ex. A, t. 68, tr. 145, tr. 151). So also the evidence discloses that the only pipe in the area could not have been a proximate cause of appellant's

fall. This pipe which was about three or four inches in height and below the level of the cement block was located immediately on the east side of the most easterly of the two blocks and so close to the block that it could not readily be removed until the block itself was removed and obviously inacessible to the appellant's path of travel. (Tr. 153, Ex. A)

The appellant testified that upon leaving the car she turned and proceeded in a generally northeasterly direction (Tr. 53) thus placing the pipe on the far side of the block from her path of travel.

It is readily apparent from a reading of appellant's testimony both on direct examination and on cross examination that she did not know what caused her to fall. On direct examination she said:

> "Q. Tell us what happened as you got out of the car.
>
> A. Well, I opened the door and the car was close enough to the curb that I didn't have to step down in. I just turned sideways, stepped out of the car, and put my other foot out, pulled myself, you know, as I walked up closed the door and started to walk and I fell over something but I don't know what it was." (Tr. 32)

and again on cross examination:

> "Q. And you can't tell us then whether it was on the third or fourth step or whatever it was that your foot hit and you don't know which foot hit?

A. No.

Q. And you don't know whether you hit the cement block or the pipe or some other object in the area, do you?

A. No.

Q. Do you?

A. No.

Q. There could have been a loose rock in the area that you might have stumbled over a good size rock as big as a cantalope?

A. There was a lot of grass around there.

Q. That you might have stumbled over that?

A. Oh, I don't think I would have fallen over grass.

Q. Well, I was thinking about weeds. Could you have stumbled in some weeds?

A. I don't think so.

Q. Do you know whether there was a rock there that you might have stumbled over, hidden in the grass or weeds?

A. No.

Q. You just don't know?

A. I don't know." (Tr. 56)

There was a marked break in the inside edge of the curb at the point where appellant claims to have stepped from after leaving the automobile (Ex. 6). There were irrigularities in the levels in the cement and dirt areas across which she claims to

have been crossing and there were weeds growing in the dirt area. (Ex. A)

A consideration of all of the evidence points not to one but to several equally probable causes for appellant's fall, other than that contended for by appellant's counsel in his brief. Logically, it would seem more probable that appellant tripped over a break in the curbing, a weed, or an irregularity in the level of the cement than that she would have tripped over a six inch high, 18 inch square cement block that was painted red, which was readily apparent and which apellant testified she knew was there. (Tr. 43, 50) Or that she could have tripped over a three or four inch piece of pipe completely inaccessible to her path of travel.

In the *Tremelling case* (supra) plaintiff sought to recover for the wrongful death of her husband who was killed while working for the Southern Pacific Railroad Co. The deceased died from a skull fracture, which from the evidence could have been caused either from his striking his head on a railroad car on the adjoining track or from striking his head after falling from the car on which he was riding. This court in ruling that plaintiff's proof as to proximate cause had failed stated:

> "The rule is well established that where an accident occurs through the alleged negligence of one person which results in injury or damage to another, and the injured person seeks to recover damages, and it is made to

appear that the accident may have been occasioned by one or two or several causes, and that the person complained of is responsible only for one of them, then the burden is on the plaintiff to show that the accident and resulting damages were produced by the cause for which the person complained of is responsible, and in case of a failure to establish such fact the plaintiff must fail in the action. In 29 Cyc. 625, it is said:

> 'The evidence must, however, do more than merely raise a conjecture or show a probability as to the cause of the injury, and no recovery can be had if the evidence leaves it to conjecture which of two probable causes resulted in the injury, where defendant was liable for only one of them.'

"If the probabilities are equally balanced that the accident was produced by a cause for which the defendant is responsible or by one fo which he is not, the plaintiff must fail." (51 Utah 200, 170 Pac. 83)

This court in *Sumsion vs. Streator-Smith, Inc.*, 103 Utah 44, 132 P 2d 680 (1953) and in *Devine vs. Cook*, 3 Utah 2d 134, 279 P 2d 1023 (1955) has reaffirmed the rule in the *Tremelling case.* The court said:

> "While deductions may be based on probabilities, the evidence must do more than merely raise a conjecture or show a probability. Where there are probabilities the other way equally or more potent the deductions are mere quesses and the jury should not be

> permitted to speculate. The rule is well established in this jurisdiction that where 'the proximate cause of the injury is left to conjecture, the plaintiff must fail as a matter of law'."

Appellant contends in her brief that although she did not know what caused her to fall at the time, she later returned to the scene and concluded that she fell either over the cement block or a pipe and that this conclusion establishes a jury question as to proximate cause.

The appellant's reasoning that such could be the rule is redundant in that the conclusion on the part of appellant is itself of necessity based upon speculation and conjecture in view of her own direct testimony that she does not know what caused her to fall and the evidence in its entiretly leaves available two or more equally probable causes of the accident.

A careful reading of the opinions and record of the three cases cited by appellant are not in point. The question of proximate cause here presented was not at issue in those cases nor can they be viewed as a modification of the rules in the *Tremelling case* (supra).

The appellant's testimony and evidence presented at the trial of her case left the question of proximate cause of her injury to speculation and conjecture and it is submitted that the trial court was correct in granting a dismissal of the action.

POINT II.

THE APPELLANT WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW AND ASSUMED THE RISK

If it is assumed that the evidence was sufficient to raise a jury question on the matter of the proximate cause of the injury respondents submit that appellant's action still fails as a matter of law on contributory negligence and asumption of risk.

There is no question concerning respondents knowledge of the cement blocks. (Tr. 43) She had seen them many times. She had good vision and good visibility (Tr. 50) Nothing distracted her attention (Tr. 51) and there was no reason why she could not have concentrated on where she was walking (Tr. 52).

In addition, appellant had a clear alternative route which was convenient and without the hazard she complains of.

If in fact apellant fell over the cement block as she assumes she obviously was not maintaining a proper lookout for her own safety. She is without excuse for her failure to see a condition which was readily apparent. Under these circumstances this court has repeatedly found negligence as a matter of law.

In the case of *Wold vs. Ogden City,* 123 Utah 270, 258 P. 2d 453, the plaintiff was injured while attempting to cross in darkness, a trench approxi-

mately four feet deep and 2½ feet wide, which was in front of his property. In his effort one of the banks of the trench gave way under his foot, resulting in his injury. There was evidence that the construction company had been requested to repair a safe place of crossing and that others had jumped across the trench on a number of occasions. The alternative was to travel one-half block to cross the street. The plaintiff exposed himself to this known danger in order to exercise a right and privilege which hed had to use the streets. In this regard the court observed:

> "But such right and privilege are not without limitation and certainly cannot include the prerogative of use without the exercise of due care. It would seem that a reasonable, prudent person would not expose himself to a known danger when there is an easy, known and convenient route about it!"

A dismissal of the plaintiff's action was sustained.

In the case of *Eisener vs. Salt Lake City*, 238 P 2d 416, 417, 120 Utah, 675, plaintiff was injured from a fall on a defective sidewalk. The court concluded that she was negligent as a matter of law. At the point of the injury a slab of cement 6' x 8' had been removed for the purpose of installing a sewer for an adjacent business house, and the city had also excavated to install a water meter. The soil had settled, leaving an irregular depression of about eight inches at the deepest place, and the defect had existed for over a year.

The plaintiff lived near the area and passed it frequently and was aware of its potential danger. During daylight hours, as she passed in the vicinity, a group of children momentarily distracted her attention and she fell into the depression and suffered injury. In sustaining the trial court's directed verdict the court used this language:

> "That the degree of care which one must exercise for his own safety is a matter for the jury generally is true, but the authorities seem to hold that a pedestrian with prior knowledge of a sidewalk defect and an unobstructed daylight view who steps into a visible defect is contributorily negligent as a matter of law, such action falling short of standards attributable to the reasonable prudent man."

The principles announced in the Eisener case are reaffirmed in *Cole vs. Kloepfer*, 123 Utah 452, 260 P. 2d 518. There this court sustained a directed verdict for personal injuries caused by a defective sidewalk. The plaintiff was aware of the sidewalk condition by reason of her previous use of the area. During the late afternoon while plaintiff was momentarily distracted by a passing automobile, she stubbed her toe on the abutting pavement, fell and suffered injury. A momentary distraction did not excuse the plaintiff from observing what she ought to have seen.

Additionally appellant in the present case points to nothing that distracted her atention.

This court has frequently set forth those circumstanced under which the assumption of risk doctrine is applicable as a defense. In the case of *Johnson vs. Maynard*, 9 Utah 2d 268, 342 P. 2d 884, 887, the court stated:

> "The fundamental consideration underlying it (assumption of risk) is that one should not be permitted to knowingly and voluntarily incur an obvious risk of personal harm when he has the ability to avoid doing so, and then hold another responsible for his injury. Its essential elements are knowledge of a danger and a free and voluntary consent to assume it." Citing *Clay vs. Dunford*, 121 Utah 177, 239 P. 2d 1075.

The doctrine was found applicable in *Wold vs. Ogden City*, 123 Utah 270, 258 P. 2d 453, because the plaintiff had exposed himself to a known danger when there was an easy known and convenient route around it.

So in the present case appellant elected to walk diagonally across the parking strip in tfiat area which was not paved and contained the cement blocks and weeds and even though within a few feet there was a safe route around these objects. (Ex. A)

In *Wightman vs. Bettilyn's Inc.* 15 Utah 2d 200, 390 P. 2d 120 (1964), this court sustained the

trial court's dismissal of plaintiff's case as a matter of law. The plaintiff, a pedestrian was injured when she tripped over some weeds that encroached on the sidewalk, a condition of which she was aware prior to the accident. This court in its opinion stated:

> "Appellant was aware of the condition of the sidewalk and as a reasonably prudent person had knowledge that there was danger of tripping and falling in traveling over such a walk. Since the danger was apparent and she was aware of it, the duty was hers to give heed to her own safety by carefully observing and avoiding entrapment by weeds or if it was too dark for such observation to use another route even though somewhat less convenient as she had done in the past when she wished to avoid dirtying her clothes in the weeds. The court did not err in concluding that the danger being apparent, appellant was contributorily negligent as a matter of law for failing to give heed to her own safety."

CONCLUSION

The appellant's evidence at the trial of the case was not sufficient to sustain her burden of proof. The evidence as to the proximate cause of her fall was left to speculation and conjecture and did not therefore present a question for the jury.

Even if appellant's conclusion as to the cause of her fall are accepted the evidence shows that she

was contributorily negligent as a matter of law and assumed the risk.

The ruling of the trial court dismissing plaintiff's action was proper and should be sustained.

Respectfully submitted,

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